No. 90-95

In the Supreme Court of the United States

OCTOBER TERM, 1990

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
PETITIONERS

v.

CSX TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Ohio statutes and regulations governing the transportation of hazardous materials by rail are preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. 434, notwithstanding their purported compatibility with the preemption provision of the Hazardous Materials Transportation Act, 49 U.S.C. App. 1811 (1988).

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. 421 *et seq.*, was enacted "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. 421. In order to ensure that regulations "relating to railroad safety * * * be nationally uniform to the extent practicable," FRSA includes a specific preemption provision, 45 U.S.C. 434, which provides in pertinent part:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

Once the Secretary has acted, additional or more stringent State regulation is permitted only where it is "necessary to eliminate or reduce an essentially local safety hazard," and is neither incompatible with Federal law nor unduly burdensome to interstate commerce. 45 U.S.C. 434. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970).

b. The Hazardous Materials Transportation Act (HMTA), 49 U.S.C. App. 1801 *et seq.*, was enacted in 1974 "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. App. 1801. Dissatisfied with "the fragmentation of regulatory power among the agencies dealing with the different modes of transportation," S. Rep. No. 1192, 93d Cong., 2d Sess. 8 (1974), Congress consolidated the authority to regulate hazardous materials transportation in the Secretary of Transportation, and repealed the previously existing authority to regulate hazardous materials transportation that had been reposed in the Federal Railroad Administrator and the Federal Highway Administrator.[1] Acting on the authority of the HMTA, the Secretary has issued extensive regulations governing the transportation and packaging of hazardous materials in all modes of transportation, see 49 C.F.R. Pts. 171-180, as well as regulations specifically applying to rail transportation, see 49 C.F.R. 174.1-174.840. Pet. App. A5.

The HMTA also addressed the preemption of state law. The Act originally provided that "any requirement, of

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[1] See 49 U.S.C. App. 1804(a) (1988); 49 U.S.C. 1655(f)(3)(A) and (B) (Supp. IV 1974); S. Rep. No. 1192, *supra*, at 38.

a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted"; inconsistent requirements would not be preempted, however, if, upon application of the State or political subdivision to the Secretary of Transportation, the Secretary determines that the state or local requirement affords equal or greater protection than HMTA and its implementing regulations, and is not an unreasonable burden on commerce. Pub. L. No. 93-633, § 112(a) and (b), 88 Stat. 2161, codified at 49 U.S.C. App. 1811(a) and (b) (1988).[2]

As a result, under FRSA a state requirement "relating to railroad safety" is preempted whenever the Secretary has issued regulations addressing the same "subject matter." 45 U.S.C. 434. Under HMTA as originally enacted, a state requirement that is consistent with federal law is not preempted under that statute's preemption provision. 49 U.S.C. App. 1811(a) (1988).

2. In 1988, Ohio enacted the Ohio Hazardous Materials Transportation Act (OHMTA). Pet. App. A1-A2. OHMTA authorizes the Public Utility Commission of Ohio (PUCO) to "adopt safety rules governing the transportation * * * of hazardous materials by railroad," and provides that such safety rules "shall be consistent with, and equivalent in scope, coverage, and content to, the provisions of the [HMTA], as amended, and regulations adopted under it." Ohio Rev. Code Ann. § 4907.64 (Anderson Supp. 1989). Acting on this authority, PUCO adopted, as requirements of Ohio law, the regulations promulgated by the Secretary of Transportation under HMTA in 49 C.F.R. Pts. 171-179. Ohio Admin. Code § 4901:3-1-10. PUCO is authorized to seek enforcement of these requirements through remedies including civil

[2] Congress recently amended the preemption provision of HMTA. See Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, §§ 4, 13, 136 Cong. Rec. S17,265, S17,269 (daily ed. Oct. 26, 1990), discussed at note 9, *infra*.

penalty actions. Ohio Rev. Code Ann. § 4905.83 (Anderson Supp. 1989).[3]

On September 27, 1988, respondents, four railroads that engage in rail transportation in Ohio and other States, filed a complaint against petitioners in the United States District Court for the Southern District of Ohio, challenging the validity of OHMTA and its implementing regulations. Respondents alleged that Ohio's requirements violate the preemption provisions of both FRSA and HMTA. Respondents also claimed that Ohio's requirements constitute an unconstitutional burden on interstate commerce. As relief, respondents sought a declaratory judgment and an injunction against the enforcement of the Ohio statute and PUCO's administrative regulations. Pet. App. A2, A19.

On cross-motions for summary judgment, the district court held that the Ohio requirements are preempted by FRSA, 45 U.S.C. 434, and permanently enjoined their enforcement. Pet. App. A16-A17. The court explained that the Ohio regulations constitute laws and regulations "relating to railroad safety," and apply in an area of rail safety in which the Secretary of Transportation has issued federal regulations. *Id.* at A5-A9. Relying on FRSA's plain language, statutory structure, and legislative history, the court concluded that 45 U.S.C. 434 preempts Ohio's regulation of the transportation of hazardous materials by rail. Pet. App. A7-A9.

3. The court of appeals affirmed. After extensively reviewing the statutory schemes enacted by FRSA and HMTA, the court concluded that the Ohio requirements are covered by FRSA's preemption provision. Pet. App. A24. The court rejected petitioners' contention that the preemptive effect of FRSA is qualified by HMTA, explaining that "the purpose of the HMTA was

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[3] Ohio also enacted legislation authorizing PUCO to adopt safety rules, that are consistent with federal requirements under HMTA, governing the highway transportation of hazardous materials. See Ohio Rev. Code Ann. § 4919.85 (Anderson Supp. 1989).

to consolidate regulation of hazardous material transportation at the Secretarial level, and not to remove such regulation of hazardous material transportation by rail from the preemption provision of the FRSA." *Id.* at A23.

The court also dismissed petitioners' reliance on *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986), and *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). In those cases, the court noted, the statutory schemes in question were found not to preempt state action because the statutes had expressly reserved a sphere of action to the States. Pet. App. A25-A26. In contrast, FRSA does not contain an explicit reservation of authority to the States; rather, "[t]he federal government clearly has the power to regulate all aspects of railroad safety." *Id.* at A26.

Finally, the court of appeals agreed with the district court that applying the FRSA preemption provision to regulations promulgated by the Secretary under HMTA is consistent with the purposes of both statutory schemes. "The national character of railroad regulation and the need for regulation of hazardous material transportation on an intermodal basis are both respected." Pet. App. A26.

DISCUSSION

In addressing an issue of first impression in the courts of appeals, the Sixth Circuit correctly held that Ohio's safety regulations governing the transportation of hazardous materials by rail are preempted by FRSA. The preemptive command of FRSA is clear and unequivocal: unless adopted to meet local safety hazards, state requirements "relating to railroad safety" are preempted if the Secretary has issued regulations on the same "subject matter." 45 U.S.C. 434. That is precisely the case here with respect to Ohio's adoption, as state requirements, of the Secretary of Transportation's regulations relating to railroad transportation of hazardous materials. Although the Secretary's regulations were issued under the

authority of HMTA, not FRSA, nothing in the language, structure, or background of either statutory scheme prevents such regulations from serving as the basis for preemption under FRSA's broad preemption provision.

The court of appeals' analysis is also consistent with this Court's exposition of the principles relevant to preemption analysis in other statutory contexts. Moreover, recent congressional amendments to the HMTA and the FRSA, although not directly addressing the question presented here, have provided a mechanism for States to participate in the administration of federal requirements governing the transportation of hazardous materials by rail, thereby reducing the practical significance of this case. In light of those considerations, the petition for a writ of certiorari should be denied.

1. The preemption of state law by a federal statute turns on the intent of Congress. *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990). Congress may express its intention to occupy the field through an explicit provision that "its enactments alone are to regulate a part of commerce"; in that case, a "state law[] regulating that aspect of commerce must fall." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

FRSA expressly preempts a state requirement "relating to railroad safety" when the Secretary of Transportation has issued regulations "covering the subject matter of such State requirement." 45 U.S.C. 434. Under a natural reading of that provision, Ohio's requirements are preempted. The text of Ohio's statute attests to its purpose of regulating railroad safety in the transportation of hazardous materials; the statute states that PUCO may "adopt safety rules governing the transportation * * * of hazardous materials by railroad." Ohio Rev. Code Ann. § 4907.64 (Anderson Supp. 1989). Moreover, the Secretary of Transportation plainly has regulations covering the "subject matter" of Ohio's requirements; Ohio has assimilated into its own body of law

federal regulations that the Secretary has promulgated under HMTA.[4]

To resist the force of FRSA's language, petitioners contend that the Secretary's regulations under HMTA are not regulations "relating to railroad safety"; therefore, petitioners argue, such regulations cannot be used as the basis for preempting Ohio's requirements. Pet. 15-27. Instead, petitioners believe that Ohio's regulations should be measured exclusively by the standards of HMTA's more permissive preemption provision. The background and structure of FRSA and HMTA refute those contentions.

a. FRSA was designed to implement a comprehensive and nationally uniform regulatory system for railroad safety. Congress provided that once the Secretary of Transportation has issued regulations in a particular area of rail safety, state regulation on the same subject matter is preempted. 45 U.S.C. 434. States are not permitted "to establish Statewide standards superimposed on national standards covering the same subject matter." H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970).

This all-encompassing preemption provision resulted from intensive debate on the proper role of the States in rail safety matters. See Pet. App. A8-A9. In rejecting the possibility that States might "adopt all Federal standards and, * * * enforce them at the State level," the House Committee Report explained that "safety in the Nation's railroads would [not] be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems," and that "such a vital part of our interstate commerce as railroads should not be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government." H.R. Rep. No. 1194, *supra*, at 11, 19. Instead, States were authorized to par-

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[4] The local-safety-hazards exception, 45 U.S.C. 434, is not available to Ohio's requirements, which are explicitly applicable statewide. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970).

ticipate in assuring rail safety by assisting the Secretary of Transportation in investigating the railroad industry's compliance with federal requirements. 45 U.S.C. 435. See H.R. Rep. No. 1194, *supra*, at 19-20.

Congress clearly envisioned that regulations pertaining to the safe transportation of hazardous materials by rail would be subject to FRSA's preemption provision. When enacting FRSA, Congress was acutely aware that a major rail-safety issue was the transportation of hazardous materials. Referring to testimony at committee hearings, the House Report described several railroad catastrophes as providing "graphic evidence * * * of the potential for destruction which these hazardous materials accidents have for the public and railroad employees." See H.R. Rep. No. 1194, *supra*, at 9. In recognition of that potential, the declaration of congressional purpose in FRSA states that the reduction of mortality, injury, and property damage "caused by accidents involving any carrier of hazardous materials" is a central goal of the Act. 45 U.S.C. 421.

The legislative history confirms that Congress considered the Secretary's existing power to regulate the transportation of hazardous materials to be part of his arsenal of authority for protecting railroad safety. The House Committee Report, in an appendix collecting prior laws that had addressed specific rail safety needs, listed the Explosives and Other Dangerous Articles Act (Explosives Act), 18 U.S.C. 831-835 (repealed), which, at the time, provided the Secretary with certain authority to regulate the transportation of dangerous materials.[5]

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[5] The Explosives Act originated in 1909 legislation, see S. Rep. No. 1192, *supra*, at 6, and, as amended, vested authority in the Interstate Commerce Commission to regulate the transportation of explosives and other articles. Act of June 25, 1948, ch. 645, 62 Stat. 738-740, repealed, Pipeline Safety Act of 1979, Pub. L. No. 96-129, § 216(b), 93 Stat. 1015. When Congress created the Department of Transportation in 1966, it transferred the preexisting regulatory authority under the Explosives Act to the Secretary of Transportation. 49 U.S.C. 1655(e)(4) (1970). By statute,

H.R. Rep. No. 1194, *supra*, at 7, 61-65. Moreover, when Congress considered the legislation that became the HMTA in 1974, the Explosives Act was recognized to be one of HMTA's precursors. See S. Rep. No. 1192, 93d Cong., 2d Sess. 6 (1974).

Against that background, it is clear that Congress did not intend to limit the preemptive scope of FRSA to regulations enacted under powers given to the Secretary in FRSA alone; rather, it contemplated that *all* of the Secretary's regulations relating to rail safety, including those specifically dealing with hazardous materials, would give rise to nationally uniform standards. Although Congress has since substantially revised the regulatory scheme governing the transportation of hazardous materials, it has never amended the preemption provision of FRSA or evinced an intent to depart from the policy of uniform regulation of rail safety matters underlying that provision.

b. Contrary to petitioner's contention (Pet. 14-18), the requirement introduced in 1974 by HMTA—that the Secretary, rather than individual agency components within the Department, shall regulate the transportation of hazardous materials—does not affect the scope of FRSA preemption. HMTA was intended to resolve problems flowing from the dispersion of authority among several agencies to regulate the transportation of hazardous materials. S. Rep. No. 1192, *supra*, at 8. HMTA therefore provided the Secretary of Transportation with new authority to regulate the transportation of hazardous materials, see 49 U.S.C. App. 1804 (1988), and gave the Secretary "a broad mandate so that comprehensive regulations can be issued as the need arises covering whatever facet of * * * transportation requires regulation." S. Rep. No. 1192, *supra*, at 32. At the same time, Con-

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the modal administrations within the Department were given the authority to promulgate regulations under the Explosives Act. 49 U.S.C. 1655(f)(3)(A) and (B) (Supp. IV 1974). See Pet. App. A20-A21.

gress amended the Department of Transportation Act to "exempt from the regulatory authority of the Federal Railroad Administrator and the Federal Highway Administrator the safety responsibility as to the transportation of hazardous materials by railroad carrier and motor carrier." *Id.* at 38. The amendment was designed to "consolidate in the Secretary of Transportation the authority needed to regulate the transportation of hazardous materials." *Ibid.*; see Transportation Safety Act of 1974, Pub. L. No. 93-633, § 113(e), 88 Stat. 2163.

The effect of HMTA was thus to confer upon the Secretary, rather than the Federal Railroad Administrator, the authority to issue regulations dealing with the transportation of hazardous materials by railroad. But, as the court of appeals recognized, that change in regulatory authority did not alter the fact that the Secretary's regulations continue to have preemptive force under FRSA. Pet. App. A24. Nor does the redistribution of power within the Department of Transportation impair the character of hazardous materials regulations relating to railroads as rail safety regulations for purposes of FRSA. See *Atchison, T. & S.F. Ry.* v. *Illinois Commerce Comm'n*, 453 F. Supp. 920, 924 (N.D. Ill. 1977); *Missouri Pac. R.R.* v. *Railroad Comm'n*, 671 F. Supp. 466, 482 (W.D. Tex. 1987), aff'd, 850 F.2d 264 (5th Cir. 1988) (per curiam).

The structure of the statute further dispels any inference that FRSA's preemption provision is intended to apply only to regulations the Secretary has promulgated under FRSA's authority. Congress expressly limited the scope of certain other provisions of FRSA to regulations issued under that statute; the absence of a comparable restriction in the preemption provision is telling.[6] See

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[6] See, *e.g.*, 45 U.S.C. 435(a) (1988) (allowing State participation in investigative and surveillance activities in connection with regulations "prescribed by the Secretary under this subchapter"); 45 U.S.C. 437(a) ("The Secretary is further authorized to issue orders directing compliance with this chapter or with any railroad

General Motors Corp. v. *United States*, 110 S. Ct. 2528, 2532 (1990); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The limitations that petitioners would place on FRSA's preemption provision are also inconsistent with FRSA's guiding purpose. When Congress enacted FRSA, it recognized that the Secretary had diverse sources of statutory authority, enacted over many years, with which to address rail safety issues, and it determined not to alter those sources of authority. Accordingly, in order to achieve a nationally uniform regime for rail safety, preemption had to apply to regulations issued, not only under the new authority provided by FRSA, but also under the Secretary's preexisting statutory authority; otherwise, the desired uniformity could not be attained. Under petitioners' approach, however, States could wield independent enforcement authority over certain rail safety issues not regulated specifically by FRSA—precisely the situation that Congress was determined to avoid. See H.R. Rep. No. 1194, *supra*, at 11-12.

Although Congress enacted a preemption framework in HMTA that is tolerant of consistent state regulation, that statute does not provide that the preemptive effect of the Secretary's regulations under HMTA would be governed solely by its—and not by FRSA's—preemption provision. See 49 U.S.C. App. 1811(a) (1988). And the legislative history affords no hint that Congress intended to make inroads in the strong policy of national uniformity in railroad safety regulation so recently expressed in FRSA.[7]

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safety rule, regulation, order, or standard issued under this subchapter."); 45 U.S.C. 437(c) ("All orders, rules, regulations, standards, and requirements in force, or prescribed or issued by the Secretary under this subchapter * * * shall have the same force and effect as a statute for purposes of the application of sections 53 and 54 of this title * * *.").

[7] The preemption provisions of the HMTA derived from the Senate bill. See H.R. Conf. Rep. No. 1589, 93d Cong., 2d Sess. 25

Petitioners nevertheless contend (Pet. 18-27) that FRSA preemption applies only to "laws * * * relating to railroad safety," and that Congress has expressly defined that phrase to exclude the HMTA. As an initial matter, we note that the phrase "relating railroad safety" as used in 45 U.S.C. 434 describes the type of *State* requirements that are preempted, not the type of *federal* requirements that accomplish the preemption. Here, there can be no doubt that Ohio's requirements relate to railroad safety; that is the precise function ascribed to them on the face of Ohio's statute.

In any event, petitioners are incorrect in claiming that Congress has defined the phrase "relating to railroad safety" to exclude the HMTA for purposes of FRSA's preemption provision. When FRSA was enacted, Congress plainly considered the Explosives Act, one of HMTA's precursors, to be a law related to railroad safety; the same characterization applies to HMTA itself. See pp. 8-9, *supra*. Petitioners engage in a misguided effort (Pet. 18-27) to weave a variety of provisions dealing with some aspect of railroad safety (particularly those enacted in the Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811), into a general definition of law "relating to railroad

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(1974). The Senate Report "endorse[d] the principle of Federal preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation"; a limited exception from this principle was permitted for state legislation, approved by the Secretary, that is essentially designed to deal with "exceptional circumstances" requiring "immediate action to secure more stringent regulations." S. Rep. No. 1192, *supra*, at 37-38. Neither the Senate nor the House Committee Reports discussed the interaction between the HMTA and the FRSA preemption provisions, see *ibid.*; H.R. Rep. No. 1083, 93d Cong., 2d Sess. (1974), nor did the floor debate on the bill reported by the Conference Committee touch on that issue. See 120 Cong. Rec. 40,677-40,680 (1974); 120 Cong. Rec. 41,409-41,410 (1974).

safety." [8] The answer to that argument, however, is that Congress has never provided a definition of that phrase that applies to 45 U.S.C. 434, and petitioners' invention of such a definition is hardly compelled by a need, for example, to lend coherence to operation of the FRSA. On the contrary, a preemption provision covering all laws relating to railroad safety, construed broadly, is perfectly compatible with more specific definitions of railroad safety laws for other purposes.

c. The conclusion that FRSA preempts Ohio law in this case does not conflict with HMTA. Pet. 27-29. HMTA, as originally enacted, did not affirmatively preserve the validity of state requirements that are consistent with federal requirements relating to hazardous materials transportation. Rather, HMTA's preemption provision simply left such consistent state requirements not preempted *by HMTA*. 49 U.S.C. App. 1811 (1988).[9]

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[8] For example, petitioners note (Pet. 20-21) that in expanding the opportunity for States to participate in the railroad safety inspection program created by FRSA, Congress did not authorize state participation in safety programs carried out under the authority of HMTA because that statute was thought not to relate exclusively to rail safety issues. See § 4(a), 94 Stat. 1812, adding 45 U.S.C. 435(g). But there is no inconsistency in both excluding hazardous materials regulations from the state-participation program, and preempting independent State requirements relating to hazardous material transportation by rail. (See also p. 17, *infra*, with respect to Congress's recent amendment to 45 U.S.C. 435 to expand the state-participation program.) Equally unavailing is petitioners' reliance (Pet. 24) on a specific definition of the term "Federal railroad safety laws" to include FRSA, HMTA, and other laws for purposes of a provision affording protection to whistle blowers complaining of violations of railroad safety laws. 45 U.S.C. 441(e). That Congress provided a specific definition in that context in 1980 does not signify an intention to modify the scope of FRSA's preemption provision, which was enacted a decade earlier. See H.R. Rep. No. 1025, 96th Cong., 2d Sess. 19 (1980).

[9] The same is true of HMTA's amended preemption provisions enacted in the Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, §§ 4, 13, 136 Cong. Rec. S17,265, S17,269 (daily ed. Oct. 26, 1990). The amended Section 105 of

The provision simply does not speak to the effect that other laws might have on state requirements. Cf. *Milwaukee* v. *Illinois*, 451 U.S. 304, 329 n.22 (1981) ("There is nothing unusual about Congress enacting a particular provision, and taking care that this enactment by itself not disturb other remedies, without considering whether the rest of the Act does so or what other remedies may be available.").

Nor is HMTA's preemption provision nullified by complementing it with FRSA's. Under HMTA, state regulation of hazardous-materials transportation by other modes than railroad can take place, if consistent with federal requirements.[10] Construing both FRSA and HMTA to apply to state requirements applicable to railroads thus serves the goal of reconciling "the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). In contrast, petitioners' construction of the statutes would work a partial implied repeal of the FRSA preemption provision. Petitioners have not made the difficult showing

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HMTA, to be codified at 49 U.S.C. App. 1804, provides a specific list of subject matters (not including the transportation of hazardous materials by rail), on which the States, political subdivisions, or Indian Tribes may maintain regulations that are substantively the same as federal regulations. 136 Cong. Rec. S17,265 (daily ed. Oct. 26, 1990). The amended Section 112(a) of HMTA, to be codified at 49 U.S.C. App. 1811(a), provides for preemption of a requirement of a State, political subdivision, or Indian Tribe where (1) compliance with such a requirement and federal requirements is not possible; (2) compliance with a requirement obstructs the implementation of federal hazardous materials regulations; or (3) preemption is accomplished under Section 105(a)(4) or 105(b). The Secretary and the courts may determine whether a requirement is preempted; the Secretary, under criteria similar to existing law, may also determine to waive preemption, subject to judicial review. 136 Cong. Rec. S17,269 (daily ed. Oct. 26, 1990).

[10] Indeed, Ohio has taken advantage of that provision with respect to highway transportation. See note 3, *supra*.

necessary to justify that disfavored result. Cf. *Morton* v. *Mancari*, 417 U.S. 535, 549-551 (1974); *Traynor* v. *Turnage*, 485 U.S. 535, 547-548 (1988).

2. We do not agree with petitioners' submission (Pet. 7-14) that the court of appeals' holding conflicts with this Court's decisions in *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986), or *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

In *Louisiana Public Service Comm'n*, the Court considered "a system of dual state and federal regulation over telephone service," 476 U.S. at 360, in which the FCC enjoyed exclusive authority over interstate telephone service, while the States retained jurisdiction over intrastate service. The Court concluded that a federally prescribed method for depreciation of telephone plant did not preempt inconsistent state regulation of depreciation methods. In so holding, the Court stressed the fact that the FCC's enabling statute contained a jurisdictional limitation intended to "fence[] off" the FCC from regulating intrastate service, thereby preserving a state role. *Id.* at 369-370. No comparable jurisdictional boundary, purporting to constrain federal authority, exists with respect to rail safety regulation; rather, once the Secretary has acted, his regulations preempt the field.

In *Pacific Gas & Elec.*, the Court held that California's requirements addressing the economic problems of long-term disposal of nuclear waste from nuclear reactors were not preempted by the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. 2011 *et seq.* The Court relied on the fact that the purpose of the Atomic Energy Act is to regulate safety issues in nuclear power, 461 U.S. at 212, without displacing the traditional authority exercised by the States over the economic considerations in utility regulation. *Id.* at 205-212. Significantly, no provision at issue in *Pacific Gas & Elec.* specifically ousted the States from playing their traditional regulatory role. In FRSA, however, Congress

carefully addressed the role of the States with respect to rail safety, and determined that the need for a nationally uniform regulatory and enforcement system was paramount.

3. Finally, the practical significance of the Sixth Circuit's holding has been diminished by recent congressional action in amending the FRSA and the HMTA. On November 16, 1990, the President signed into law the Hazardous Materials Transportation Uniform Safety Act of 1990 (Safety Act), Pub. L. No. 101-615, 136 Cong. Rec. S17,264-S17,274 (daily ed. Oct. 26, 1990). The Safety Act represents the first major amendment of the HMTA since its enactment and emerged from "a long and comprehensive multiyear reevaluation" of that statute's operation. 136 Cong. Rec. S17,274 (remarks of Sen. Exon).

The House Energy and Commerce Committee reported a bill that would have expressly rejected the interpretation of the FRSA reached by the district court in this case. See H.R. Rep. No. 444, 101st Cong., 2d Sess. Pt. 1, at 53-54 (1990).[11] The House proposal, however, was not enacted. As a supporter of the House proposal explained, "an amendment permitting State enforcement * * * would doom any hazardous materials transportation legislation this Congress." 136 Cong. Rec. S17,276 (daily ed. Oct. 26, 1990) (remarks of Sen. Breaux).

Although the Safety Act was not intended to affect the merits of the legal issue involved in this case,[12] Con-

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[11] The report on a competing bill produced by the House Public Works and Transportation Committee did not directly discuss this issue. See H.R. Rep. No. 444, 101st Cong., 2d Sess. Pt. 2 (1990).

[12] Section 30 of the Safety Act states: "Nothing in this Act, including the amendments made by this Act, shall be construed to alter, amend, modify, or otherwise affect the scope of section 205 of the Federal Railroad Safety Act of 1970 [45 U.S.C. 434]." 136 Cong. Rec. S17,274 (daily ed. Oct. 26, 1990). Legislators in both chambers indicated their understanding that the Safety Act would not affect the legal issues in the pending litigation over the scope of FRSA preemption. See 136 Cong. Rec. H13,648 (daily ed.

gress's express authorization of state participation in the rail safety inspection program with respect to hazardous materials transportation has considerably lessened the practical significance of the court of appeals' holding. Section 28 of the Safety Act, 136 Cong. Rec. S17,274 (daily ed. Oct. 26, 1990), amends Section 206(a) of FRSA, 45 U.S.C. 435(a), to "expand the State participation program * * * to encompass hazardous materials regulations promulgated by DOT pursuant to HMTA," such that States may participate with respect to "all areas of railroad safety." S. Rep. No. 449, 101st Cong., 2d Sess. 30 (1990).[13] The provision leaves intact the Secretary's "exclusive authority to assess penalties and to request injunctive relief," but enables a State to apply to a district court for assessment and collection of a civil penalty if federal officials do not act within 60 days after receiving notification of a violation from a participating State agency. The amendment thus "close[s] a loophole in current law which limits the participation program to general rail safety violations but does not include [hazardous materials] violations." *Ibid.* See also 136 Cong. Rec. S16,867 (daily ed. Oct. 23, 1990) (remarks of Sen. Exon) (explaining the provision's genesis as the resolution of a conflict between some States, which argued for authority to enforce hazardous materials requirements, and the railroad industry, which had argued for full federal preemption).

The amendments made by the Safety Act thus provide a vehicle for States to participate in the administration of the federal hazardous-materials regulations with respect to railroads. Ohio's present legislation sought to achieve a similar result by incorporating federal requirements

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Oct. 25, 1990) (remarks of Rep. Whittaker and Rep. Luken); *id.* at S17,276 (daily ed. Oct. 26, 1990) (remarks of Sen. Breaux).

[13] The FRSA participation program authorizes States to "participate in carrying out investigative and surveillance activities" with respect to rail safety issues under conditions prescribed in the statute. 45 U.S.C. 435(a).

into state law. Although Ohio's legislative approach to bringing its resources to bear on the problem differs from the approach adopted by the Safety Act, that Act addresses in significant respects the concerns that prompted Ohio's action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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